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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL RUIZ, Defendant and Appellant.	D075168 (Super. Ct. No. SCN377196)

APPEAL from a judgment of the Superior Court of San Diego County, William Y. Wood, Judge. Affirmed in part; reversed in part with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Miguel Angel Ruiz of reckless driving while evading a peace officer. (Veh. Code, § 2800.2, subd. (a).)[1] The trial court sentenced Ruiz to a term of two years in prison.

Ruiz appeals. He contends (1) the trial court erred by not instructing the jury on the lesser included offense of misdemeanor evading (§ 2800.1), (2) the trial court erred by instructing the jury that an eyewitness's certainty could be a factor in evaluating his identification of the defendant, and (3) the court erred by imposing certain fines and fees without conducting a hearing to determine Ruiz's ability to pay them. We conclude (1) any error in failing to provide misdemeanor evading instructions was harmless, (2) Ruiz forfeited any claim of error in the certainty instruction by failing to object (and his counsel was not ineffective based on that failure), and (3) certain fines and fees were improperly imposed for the first time in the abstract of judgment. We therefore reverse the judgment in part and remand for reconsideration of the fines and fees. In all other respects, we affirm.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

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1 Further statutory references are to the Vehicle Code unless otherwise specified.

On August 18, 2017, two police officers in an unmarked patrol car were observing traffic in Oceanside, California. They were wearing standard blue police uniforms with badges and guns. While observing traffic, they saw a white Toyota swerve around another car that was stopped at a stop sign. The Toyota proceeded through the intersection without stopping. One police officer was able to see the male driver's face, approximately 30 feet away, and a female passenger. The driver looked familiar to the police officer. Later, the officer searched through photos of individuals posted at his police station and identified the driver as Ruiz.

The officers followed Ruiz and activated their emergency lights. Ruiz was driving approximately 25 to 35 miles per hour. Ruiz did not stop and made several more turns. The police officers activated their siren. Two marked Oceanside patrol cars joined the pursuit. Ruiz accelerated to 35 to 40 miles per hour, ran two or three more stop signs, and drove even faster, up to 45 and 50 miles per hour. They were in a residential area, and the speed limit was 25 miles per hour. A supervisor told the officers to terminate the pursuit at that point because it was too dangerous. The pursuit lasted three to four minutes in total.

An officer traced the license number of the white Toyota. He identified the owner as a woman with an address near the intersection where police first saw the vehicle. Ruiz lived in a different apartment at the same address. The woman had been romantically involved with Ruiz, and they had two children together. A week later, police arrested Ruiz.

At trial, Ruiz called his brother and his mother to testify on his behalf. They testified that Ruiz was at home with them on the night of the pursuit. They also testified that Ruiz did not know how to drive.

DISCUSSION

I

Lesser Included Offense Instruction

Ruiz contends the trial court should have instructed the jury on misdemeanor evading a peace officer under section 2800.1. " 'An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.' [Citation.] The 'substantial evidence requirement is not satisfied by " '*any* evidence . . . no matter how weak,' " but rather by evidence from which a jury . . . could conclude "that the lesser offense, but not the greater, was committed." ' [Citation.] 'On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense.' " (*People v. Nelson* (2016) 1 Cal.5th 513, 538.)

Section 2800.1 provides, in relevant part, as follows: "Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor . . . ." (§ 2800.1, subd. (a).) In addition, the prosecution must prove that the peace officer's motor vehicle was operated by a peace officer in a distinctive uniform, the vehicle was distinctively marked, it was sounding a siren as "reasonably necessary,"

and it was exhibiting at least one lighted red lamp visible from the front that the defendant saw or reasonably should have seen. (§ 2800.1, subd. (a)(1)-(4).)

If a violation of section 2800.1 is proved, and additionally "the pursued vehicle is driving in a willful or wanton disregard for the safety of persons or property," then section 2800.2 is violated. (§ 2800.2, subd. (a).) "[A] willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." (§ 2800.2, subd. (b).)

"Facially, it could not be more clear that . . . section 2800.1 is a lesser included offense of . . . section 2800.2. The only distinction between the two crimes is that in committing the greater offense the defendant drives the pursued vehicle 'in a willful or wanton disregard for the safety of persons or property.' " (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1679-1680 (*Springfield*).)

Ruiz argues that the evidence was consistent with the finding that he did not drive in a willful or wanton disregard for the safety of persons or property, and therefore the trial court should have instructed the jury on misdemeanor evading under section 2800.1. We need not resolve this question. Even if we assume the trial court erred, we conclude that any such error was not prejudicial.

As Ruiz acknowledges, our Supreme Court has held that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility." (*People*

v. Breverman (1998) 19 Cal.4th 142, 165.) " 'Under [this] standard, prejudicial error is shown where " ' "after an examination of the entire cause, including the evidence," [the reviewing court] is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] '[Our Supreme Court has] made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " ' " (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

Ruiz has not shown there is a reasonable chance the jury would have found him not guilty of a violation of section 2800.2 (or been unable to reach a verdict) if the trial court had provided an instruction on section 2800.1. As noted, the only distinction between the two offenses is the element of willful and wanton disregard for the safety of persons or property. (*Springfield*, *supra*, 13 Cal.App.4th at p. 1680.) The evidence supporting this element was strong. Two police officers testified at trial that Ruiz committed at least three traffic violations that carry traffic violation points during the pursuit. This evidence satisfies the willful and wanton disregard element as a matter of law. (§ 2800.2, subd. (b).) "Three point violations are willful and wanton disregard by definition, so there is nothing other than their existence for the jury to find." (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 641.) In addition, the officers testified that Ruiz failed to stop at several stop signs and drove 45 to 50 miles per hour in a crowded residential area where the speed limit was only 25 miles per hour.

At trial, Ruiz did not contest this evidence. His counsel did not mention the element of willful and wanton disregard in his closing argument. His defense focused

solely on identity, which the jury by its verdict plainly rejected. Given the strength of the evidence on the element of willful and wanton disregard, and Ruiz's decision not to contest it, there is no reasonable chance any juror would have found in Ruiz's favor on this element if the trial court had instructed the jury on section 2800.1. (See *People v. Grigsby* (1969) 275 Cal.App.2d 767, 775-776 [error in failing to instruct on lesser included offense harmless where, among other things, defendant offered alibi defense and jury rejected it].)

Ruiz claims the evidence showed his driving was "on the more mild-mannered and low-speed end of all possible evasion strategies" and therefore the jury may have believed the willful and wanton disregard element was not met. But Ruiz does not persuasively explain why the lesser included offense instruction would have prompted any juror to change his or her evaluation of this element, given the strength of the evidence and its uncontested nature. Ruiz has not shown any assumed error was prejudicial.

II

Eyewitness Certainty Instruction

Using CALCRIM No. 315, the trial court instructed the jury on various questions to consider in evaluating an eyewitness identification of a defendant. Among these questions was, "How certain was the witness when he made an identification?" Ruiz contends the court erred by including this question. He argues that consideration of an eyewitness's certainty has no scientific basis, and the jury instruction allowing it to be considered violated his right to due process of law.

Ruiz did not object to this instruction at trial. He has therefore forfeited any claim of error on appeal. (See *People v. Sánchez* (2016) 63 Cal.4th 411, 461 (*Sánchez*) [holding that a defendant forfeited a similar challenge to an analogous CALJIC instruction regarding certainty].)

Anticipating this result, Ruiz argues his counsel was constitutionally ineffective by failing to object. We disagree. "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

We need not consider whether Ruiz's counsel should have objected to the certainty instruction. Because he cannot show that any such objection would have been successful, he cannot demonstrate a reasonable probability that an objection would have resulted in a more favorable result at trial. (See *People v. Wharton* (1991) 53 Cal.3d 522, 576.) Our Supreme Court has repeatedly approved the use of certainty as a factor in evaluating eyewitness identifications. As that court recently explained, "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. [Citation.] In *People v. Wright* (1988) 45 Cal.3d 1126, 1141, we held 'that a proper

instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' We specifically approved CALJIC No. 2.92, including its certainty factor. (*Wright*, at pp. 1144, 1166.) We have since reiterated the propriety of including this factor. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232.)" (*Sánchez, supra*, 63 Cal.4th at p. 462.)

Our Supreme Court is currently considering whether the certainty factor as articulated in CALCRIM No. 315 remains valid. (See *People v. Lemcke*, review granted Oct. 10, 2018, S250108.) Unless and until the Supreme Court overrules its prior precedent, however, the trial court was bound by it—and so are we. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In light of this binding precedent, Ruiz has not shown that any objection to the certainty factor would have been successful and, consequently, that there was a reasonable probability that his objection would have resulted in a more favorable result at trial. Ruiz's argument is therefore unpersuasive.

III

Fines and Fees

In its oral pronouncement of judgment, the trial court did not impose any fines or fees. The court's sentencing minute order and abstract of judgment, however, included a $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), $40 court operations assessment (Pen. Code, § 1465.8), a $30 criminal conviction assessment (Gov. Code, § 70373), and a $154 criminal justice administration fee (Gov. Code, § 29550 et seq.). Several weeks

after Ruiz's sentencing, *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164 held that a trial court must consider a defendant's ability to pay before imposing various fines and fees.

Because he did not have the opportunity to object to the restitution fine, the court operations assessment, and the criminal conviction assessment, Ruiz contends the matter should be remanded to the trial court to allow him to object based on his ability to pay. The Attorney General agrees, and we accept this concession.

Ruiz attempts to distinguish the criminal justice administration fee, also knows as a booking fee. He argues that, unlike the restitution fine and other fees, the criminal justice administration fee was discretionary. He contends the court's oral pronouncement of judgment shows it did not intend to impose this fee. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The Attorney General disagrees. He argues that the criminal justice administration fee was mandatory under the circumstances here and therefore should be considered along with the restitution fine and other fees on remand.

In order to resolve this dispute, we must determine the meaning of the relevant statutes. "Our fundamental task in making this determination is to ascertain the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin our inquiry by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] In doing so, however, we do not consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . [Citation.]' [Citation.] That is, we construe the words in question ' "in context, keeping in mind the nature and obvious

purpose of the statute . . . ." [Citation.]' [Citation.] We must harmonize 'the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.' [Citations.] We must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend." (*People v. Mendoza* (2000) 23 Cal.4th 896, 907-908.)

"Three statutes address defendants' payment of jail booking fees, Government Code sections 29550, 29550.1, and 29550.2. Which section applies to a given defendant depends on which governmental entity has arrested a defendant before transporting him or her to a county jail." (*People v. McCullough* (2013) 56 Cal.4th 589, 592.) "Arrests made by a 'city, special district, school district, community college district, college, university or other local arresting agency' are governed by Government Code sections 29550, subdivision (a)(1) and 29550.1. Arrests made by a county are governed by Government Code section 29550, subdivision (c) and those made by 'any governmental entity not specified in Section 29550 or 29550.1' are governed by Government Code section 29550.2, subdivision (a)." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399, fn. 6 (*Pacheco*).)

Ruiz was arrested by police officers employed by the City of Oceanside. Government Code section 29550, subdivision (a)(1) authorizes a county to impose a fee on a city "for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of that city . . . , where the arrested persons are brought to the county jail for booking or detention." Under Government Code section 29550.1, the city is entitled to recover that fee from the arrestee if he or she

is convicted: "Any city . . . whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction *shall contain* an order for payment of the amount of the criminal justice administration fee by the convicted person . . . ." (Italics added.) Under the plain language of the statutes, if the county imposes a fee on the city for arresting and booking a person, the court must order a convicted person to reimburse the city for payment of the fee. In these circumstances, the fee is mandatory for the convicted person.

Ruiz argues that Government Code section 29550, subdivision (d) applies here. We disagree. In addition to authorizing a county to recover its booking expenses from cities and other governmental agencies, that section allows a county to recover its expenses directly from an arrested and convicted person if its own employees make the arrest. (Gov. Code, § 29550, subd. (c).) In the next subdivision, the statute specifies the procedure for such recovery: "When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: [¶] (1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt. [¶] (2) The court shall, as a condition of probation, order the convicted person, based on his or her ability to pay, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Gov. Code, § 29550, subd. (d).)

Although the statute uses the word "agency" in its first clause, the context makes clear that Government Code section 29550, subdivision (d) is limited to direct county arrests and expenses. The preceding subdivision (c) references county arrests explicitly. Subdivision (d)(2) characterizes the fee order as a "reimburse[ment]" to the county. This direct reimbursement is inconsistent with the statutory scheme with respect to cities, which pay the county themselves and seek reimbursement of their expenses from the convicted defendant. (Gov. Code, § 29550.1.) It is clear that the mandatory fee structure in Government Code section 29550.1 applies to city arrests. (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1399, fn. 6.) Ruiz's contention that Government Code section 29550, subdivision (d) also applies to city arrests is unpersuasive.

Because the criminal justice administration fee was mandatory, Ruiz's claim that the court impliedly exercised its statutory discretion in refusing to impose it is unpersuasive. On remand, the trial court shall reconsider this fee along with the restitution fine and the other fees challenged by Ruiz.

DISPOSITION

The judgment is reversed in part as to the fines and fees purportedly imposed on Ruiz. On remand, the trial court should reconsider the imposition of these fines and fees, including any objection based on Ruiz's ability to pay. In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.